

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

STEVE E. COSSEY

PLAINTIFF

v.

NO. 15-5108

CAROLYN W. COLVIN, Commissioner
Social Security Administration

DEFENDANT

MEMORANDUM OPINION

Plaintiff, Steve E. Cossey, brings this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of a decision of the Commissioner of the Social Security Administration (Commissioner) denying his claims for period of disability and disability insurance benefits (DIB) and supplemental security income (SSI) benefits under the provisions of Titles II and XVI of the Social Security Act (Act). In this judicial review, the Court must determine whether there is substantial evidence in the administrative record to support the Commissioner's decision. See 42 U.S.C. § 405(g).

I. Procedural Background:

Plaintiff protectively filed his current applications for DIB and SSI on April 10, 2012, alleging an inability to work since April 1, 2010, due to memory problems, back problems and leg problems. (Doc. 12, pp. 137, 139, 168). For DIB purposes, Plaintiff maintained insured status through December 31, 2011. (Doc. 12, pp. 18, 146). An administrative video hearing was held on August 8, 2013, at which Plaintiff appeared with counsel and testified. (Doc. 12, pp. 32-51).

By written decision dated January 15, 2014, the ALJ found Plaintiff was not disabled prior to the expiration of his insured status on December 31, 2011, but that Plaintiff became disabled on November 30, 2013, and remained disabled through the date of the decision. (Doc. 12, p. 18). Specifically, the ALJ found that since the alleged onset date, Plaintiff had the following severe impairments: degenerative disc disease and obesity. (Doc. 12, p. 20). However, after reviewing all of the evidence presented, the ALJ determined that since the alleged onset date, Plaintiff's impairments did not meet or equal the level of severity of any impairment listed in the Listing of Impairments found in Appendix I, Subpart P, Regulation No. 4. (Doc. 12, p. 21). The ALJ found that since the alleged onset date, Plaintiff retained the residual functional capacity (RFC) to:

perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except the claimant is able to occasionally climb, balance, crawl, kneel, stoop, and crouch.

(Doc. 12, p. 21). With the help of a vocational expert, the ALJ determined that prior to November 30, 2013, Plaintiff could perform work as a fishing lure assembler, a file clerk, and an inspector and checker. (Doc. 12, p. 25).

Plaintiff then requested a review of the hearing decision by the Appeals Council, which denied that request on March 20, 2015. (Doc. 12, p. 5). Subsequently, Plaintiff filed this action. (Doc. 1). This case is before the undersigned pursuant to the consent of the parties. (Doc. 8). Both parties have filed appeal briefs, and the case is now ready for decision. (Docs. 10, 11).

The Court has reviewed the entire transcript. The complete set of facts and arguments are presented in the parties' briefs, and are repeated here only to the extent necessary.

II. Applicable Law:

This Court's role is to determine whether the Commissioner's findings are supported by substantial evidence on the record as a whole. Ramirez v. Barnhart, 292 F.3d 576, 583 (8th Cir. 2002). Substantial evidence is less than a preponderance but it is enough that a reasonable mind would find it adequate to support the Commissioner's decision. The ALJ's decision must be affirmed if the record contains substantial evidence to support it. Edwards v. Barnhart, 314 F.3d 964, 966 (8th Cir. 2003). As long as there is substantial evidence in the record that supports the Commissioner's decision, the Court may not reverse it simply because substantial evidence exists in the record that would have supported a contrary outcome, or because the Court would have decided the case differently. Haley v. Massanari, 258 F.3d 742, 747 (8th Cir. 2001). In other words, if after reviewing the record it is possible to draw two inconsistent positions from the evidence and one of those positions represents the findings of the ALJ, the decision of the ALJ must be affirmed. Young v. Apfel, 221 F.3d 1065, 1068 (8th Cir. 2000).

It is well-established that a claimant for Social Security disability benefits has the burden of proving his disability by establishing a physical or mental disability that has lasted at least one year and that prevents him from engaging in any substantial gainful activity. Pearsall v. Massanari, 274 F.3d 1211, 1217 (8th Cir. 2001); see also 42 U.S.C. §§ 423(d)(1)(A), 1382c (a)(3)(A). The Act defines “physical or mental impairment” as “an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.” 42 U.S.C. § 423(d)(3). A Plaintiff must show that his disability, not simply his impairment, has lasted for at least twelve consecutive months.

The Commissioner's regulations require her to apply a five-step sequential evaluation process to each claim for disability benefits: (1) whether the claimant has engaged in substantial gainful activity since filing his claim; (2) whether the claimant has a severe physical and/or mental impairment or combination of impairments; (3) whether the impairment(s) meet or equal an impairment in the listings; (4) whether the impairment(s) prevent the claimant from doing past relevant work; and (5) whether the claimant is able to perform other work in the national economy given his age, education, and experience. See 20 C.F.R. §§ 404.1520, 416.920. Only if the final stage is reached does the fact finder consider the Plaintiff's age, education, and work experience in light of his residual functional capacity. See McCoy v. Schweiker, 683 F.2d 1138, 1141-42 (8th Cir. 1982), abrogated on other grounds by Higgins v. Apfel, 222 F.3d 504, 505 (8th Cir. 2000); 20 C.F.R. §§ 404.1520, 416.920.

III. Discussion:

Plaintiff argues the following issues on appeal: 1) the ALJ erred in failing to develop the record; 2) the ALJ erred in determining Plaintiff's physical and mental impairments and by not performing the psychiatric review technique; 3) the ALJ erred in assessing the credibility of Plaintiff's subjective complaints; and 4) the ALJ erred in determining Plaintiff's RFC.

A. Insured Status and Relevant Time Periods:

In order to have insured status under the Act, an individual is required to have twenty quarters of coverage in each forty-quarter period ending with the first quarter of disability. 42 U.S.C. § 416(i)(3)(B). Plaintiff last met this requirement on December 31, 2011. Regarding Plaintiff's application for DIB, the overreaching issue in this case is the question of whether Plaintiff was disabled during the relevant time period of April 1, 2010, his alleged onset date

of disability, through December 31, 2011, the last date he was in insured status under Title II of the Act.

In order for Plaintiff to qualify for DIB he must prove that on or before the expiration of his insured status he was unable to engage in substantial gainful activity due to a medically determinable physical or mental impairment which is expected to last for at least twelve months or result in death. Basinger v. Heckler, 725 F.2d 1166, 1168 (8th Cir. 1984). Records and medical opinions from outside the insured period can only be used in “helping to elucidate a medical condition during the time for which benefits might be rewarded.” Cox v. Barnhart, 471 F.3d 902, 907 (8th Cir. 2006) (holding that the parties must focus their attention on claimant's condition at the time she last met insured status requirements).

With respect to Plaintiff's SSI application, benefits are not payable prior to the date of application, regardless of how far back disability may, in fact, be alleged or found to extend. See 20 C.F.R. § 416.335. Therefore, the relevant period is from April 10, 2012, the date Plaintiff protectively applied for SSI benefits, through November 30, 2013, the date Plaintiff was found to be disabled.

B. Full and Fair Development of the Record:

The ALJ has a duty to fully and fairly develop the record. See Frankl v. Shalala, 47 F.3d 935, 938 (8th Cir.1995). The ALJ's duty to fully and fairly develop the record is independent of Plaintiff's burden to press his case. Vossen v. Astrue, 612 F.3d 1011, 1016 (8th Cir. 2010). The ALJ, however, is not required to function as Plaintiff's substitute counsel, but only to develop a reasonably complete record. “Reversal due to failure to develop the record is only warranted where such failure is unfair or prejudicial.” Shannon v. Chater, 54 F.3d 484, 488 (8th Cir. 1995). “While an ALJ does have a duty to develop the record, this duty is not

never-ending and an ALJ is not required to disprove every possible impairment.” McCoy v. Astrue, 648 F.3d 605, 612 (8th Cir. 2011). After reviewing the entire record, the Court finds the record before the ALJ contained the evidence required to make a full and informed decision regarding Plaintiff’s capabilities during the relevant time period. Accordingly, the undersigned finds the ALJ fully and fairly developed the record.

C. Plaintiff’s Impairments and Psychiatric Review Technique Form:

At Step Two of the sequential analysis, the ALJ is required to determine whether a claimant's impairments are severe. See 20 C.F.R. § 404.1520(c). To be severe, an impairment only needs to have more than a minimal impact on a claimant's ability to perform work-related activities. See Social Security Ruling 96-3p. The Step Two requirement is only a threshold test so the claimant's burden is minimal and does not require a showing that the impairment is disabling in nature. See Brown v. Yuckert, 482 U.S. 137, 153-54 (1987). The claimant, however, has the burden of proof of showing he suffers from a medically-severe impairment at Step Two. See Mittlestedt v. Apfel, 204 F.3d 847, 852 (8th Cir.2000).

While the ALJ did not find Plaintiff’s alleged hand tremors or depression to be severe impairments, the ALJ stated that he considered all of Plaintiff’s impairments, including the impairments that were found to be non-severe. (Doc. 12, p. 19). See Swartz v. Barnhart, 188 F. App'x 361, 368 (6th Cir.2006) (where ALJ finds at least one “severe” impairment and proceeds to assess claimant's RFC based on all alleged impairments, any error in failing to identify particular impairment as “severe” at step two is harmless); Elmore v. Astrue, 2012 WL 1085487 *12 (E.D. Mo. March 5, 2012); see also 20 C.F.R. § 416.945(a)(2) (in assessing RFC, ALJ must consider “all of [a claimant's] medically determinable impairments ..., including ... impairments that are not ‘severe’ ”); § 416.923 (ALJ must “consider the combined

effect of all [the claimant's] impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity”). Thus, the ALJ's finding that Plaintiff's alleged hand tremors and depression were not “severe” impairments does not constitute reversible error.

Plaintiff also argues that the ALJ erred in not completing the psychiatric review technique. The Eighth Circuit Court of Appeals has found the failure to perform the psychiatric review technique to be harmless error where there is no credible evidence of a severe mental impairment. Nielson v. Barnhart, 88 Fed.Appx. 145, 147 (8th Cir. 2004) (per curiam) (no evidence of mental impairment, and ALJ made a finding that any alleged depression was not severe); Cakora v. Barnhart, 67 Fed.Appx. 983, 985 (8th Cir. 2003) (per curiam) (no sufficient evidence that the impairment was severe). After reviewing the record, the Court finds the absence of a psychiatric review technique by the ALJ is harmless error in this case.

D. Subjective Complaints and Credibility Analysis:

We now address the ALJ's assessment of Plaintiff's subjective complaints. The ALJ was required to consider all the evidence relating to Plaintiff's subjective complaints including evidence presented by third parties that relates to: (1) Plaintiff's daily activities; (2) the duration, frequency, and intensity of his pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness, and side effects of his medication; and (5) functional restrictions. See Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984). While an ALJ may not discount a claimant's subjective complaints solely because the medical evidence fails to support them, an ALJ may discount those complaints where inconsistencies appear in the record as a whole. Id. As the United States Court of Appeals for the Eighth Circuit observed, “Our touchstone is that

[a claimant's] credibility is primarily a matter for the ALJ to decide.” Edwards v. Barnhart, 314 F.3d 964, 966 (8th Cir. 2003).

After reviewing the administrative record, it is clear that the ALJ properly considered and evaluated Plaintiff’s subjective complaints, including the Polaski factors. A review of the record reveals that during the relevant time period, Plaintiff was able to take care of his personal needs but noted having problems putting on pants, and sitting up to eat; to prepare simple meals; to shop when required; to drive; to pay bills; and to watch television. (Doc. 12, pp. 186-189). The record also reveals that Plaintiff helped his daughter move a mobile home in January of 2011, and that he reported an ability to perform activities of daily living without assistance in August of 2012. (Doc. 12, pp. 383, 453).

With respect to Plaintiff’s degenerative disc disease, the record reveals that Plaintiff received some relief with treatment. In September of 2010, Plaintiff reported that an injection relieved 90% of his pain. (Doc. 12, p. 389). In January of 2012, Plaintiff sought emergency treatment for a kidney stone. At that time, Plaintiff was noted to have a normal back inspection with normal range of motion and no tenderness. (Doc. 12, p. 476). Medical records also reveal that throughout the relevant time period, Plaintiff was noted to have a normal gait, and to be able to stand without difficulty.

Therefore, although it is clear that Plaintiff suffers with some degree of limitation, he has not established that he was unable to engage in any gainful activity during the time period in question. Accordingly, the Court concludes that substantial evidence supports the ALJ’s conclusion that Plaintiff’s subjective complaints were not totally credible for the time period in question.

E. ALJ's RFC Determination and Medical Opinions:

RFC is the most a person can do despite that person's limitations. 20 C.F.R. § 404.1545(a)(1). It is assessed using all relevant evidence in the record. Id. This includes medical records, observations of treating physicians and others, and the claimant's own descriptions of his limitations. Guilliams v. Barnhart, 393 F.3d 798, 801 (8th Cir. 2005); Eichelberger v. Barnhart, 390 F.3d 584, 591 (8th Cir. 2004). Limitations resulting from symptoms such as pain are also factored into the assessment. 20 C.F.R. § 404.1545(a)(3). The United States Court of Appeals for the Eighth Circuit has held that a "claimant's residual functional capacity is a medical question." Lauer v. Apfel, 245 F.3d 700, 704 (8th Cir. 2001). Therefore, an ALJ's determination concerning a claimant's RFC must be supported by medical evidence that addresses the claimant's ability to function in the workplace. Lewis v. Barnhart, 353 F.3d 642, 646 (8th Cir. 2003). "[T]he ALJ is [also] required to set forth specifically a claimant's limitations and to determine how those limitations affect his RFC." Id.

In determining that Plaintiff maintained the RFC to perform light work with limitations prior to November 30, 2013, the ALJ considered the medical assessments of the examining and non-examining agency medical consultants; Plaintiff's subjective complaints; and his medical records, including the records of Dr. Cathy C. Luo. The Court notes that in determining Plaintiff's RFC, the ALJ discussed the medical opinions of examining and non-examining medical professionals, and set forth the reasons for the weight given to the opinions. Renstrom v. Astrue, 680 F.3d 1057, 1065 (8th Cir. 2012) ("It is the ALJ's function to resolve conflicts among the opinions of various treating and examining physicians")(citations omitted); Prosch v. Apfel, 201 F.3d 1010 at 1012 (the ALJ may reject the conclusions of any medical expert, whether hired by the claimant or the government, if they are inconsistent with

the record as a whole). While Plaintiff argues the ALJ erred in not giving more weight to the opinion of consultative examiner, Dr. Ted Honghiran, the Court finds the ALJ adequately explained the basis for not adopting Dr. Honghiran's opinion in its entirety.

With respect to Plaintiff's obesity, although Plaintiff's treating physicians noted Plaintiff's weight, his treating physicians did not suggest Plaintiff's obesity imposed any additional work-related limitations. See Anderson v. Barnhart, 344 F.3d 809, 814 (8th Cir. 2003). Based on the record as a whole, the Court finds substantial evidence to support the ALJ's RFC determination for the time period in question.

F. Hypothetical Question to the Vocational Expert:

After thoroughly reviewing the hearing transcript along with the entire evidence of record, the Court finds that the hypothetical the ALJ posed to the vocational expert fully set forth the impairments which the ALJ accepted as true and which were supported by the record as a whole. Goff v. Barnhart, 421 F.3d 785, 794 (8th Cir. 2005). Accordingly, the Court finds that the vocational expert's opinion constitutes substantial evidence supporting the ALJ's conclusion that Plaintiff's impairments did not preclude him from performing work as a fishing lure assembler, a file clerk, and an inspector and checker prior to November 30, 2013. Pickney v. Chater, 96 F.3d 294, 296 (8th Cir. 1996) (testimony from vocational expert based on properly phrased hypothetical question constitutes substantial evidence).

IV. Conclusion:

Accordingly, having carefully reviewed the record, the undersigned finds substantial evidence supporting the ALJ's decision denying the Plaintiff benefits, and thus the decision

should be affirmed. The undersigned further finds that the Plaintiff's Complaint should be dismissed with prejudice.

DATED this 23rd day of August, 2016.

/s/ *Erin L. Setser*

HON. ERIN L. SETSER
UNITED STATES MAGISTRATE JUDGE